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UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

ELAINE L. CHAO, Secretary	) Case No.
of Labor, UNITED STATES	)
DEPARTMENT OF LABOR,	)
	)
Petitioner,	)
	)
v.	) <b>SECRETARY'S PETITION TO</b>
	) <b>ENFORCE ADMINISTRATIVE</b>
MATTHEW J. DONNELLY d/b/a/ The	) <b>SUBPOENA DUCES TECUM</b>
BUSINESS APPRAISAL INSTITUTE,	)
	)
Respondents.	)
	)

COMES NOW Petitioner ELAINE L. CHAO, Secretary of  
Labor, United States Department of Labor ("the Secretary"), and  
petitions the Court to compel Respondents Matt Donnelly and The  
Business Appraisal Institute ("Respondents") to produce  
documentary evidence and in support of her Petition asserts:

**JURISDICTION**

1. This Petition is brought to compel Respondents to  
comply with an Administrative Subpoena *Duces Tecum* issued by the

1 Regional Director of the Atlanta Regional Office of the  
2 Employment Benefits Security Administration ("EBSA") of the  
3 United States Department of Labor in an investigation conducted  
4 pursuant to section 504 of the Employee Retirement Income  
5 Security Act of 1974 ("ERISA"), 29 U.S.C. § 1134.

6 2. This Court has subject matter jurisdiction over this  
7 Petition pursuant to Sections 9 and 10 of the Federal Trade  
8 Commission Act, 15 U.S.C. §§ 49 and 50, as made applicable to  
9 ERISA by Sections 504(c) and 502(e)(1) of ERISA, 29 U.S.C.  
10 §§ 1134(c) and 1132(e)(1).

#### 11 **VENUE AND INTRADISTRICT ASSIGNMENT**

12 3. Respondent Matthew J. Donnelly ("Donnelly") is a  
13 California resident residing at 180 2<sup>nd</sup> Street, Suite 419,  
14 Oakland, California 94607. Donnelly owns and conducts business  
15 as The Business Appraisal Institute ("BAI") pursuant to a  
16 Fictitious Business Name filed with the County of San Francisco  
17 on April 1, 2003. BAI has a mailing address in San Francisco,  
18 but the work Donnelly performs as BAI is performed at his  
19 residence in Oakland. Affidavit of Investigator Jennifer Del  
20 Nero In Support of Petition to Enforce Administrative Subpoenas  
21 *Duces Tecum* ("JDN Aff.") at ¶ 4. Both addresses are within the  
22 jurisdiction of this Court.

23 4. Respondents have been at all pertinent times a service  
24 provider to the Bruister & Associates Employee Stock Ownership  
25 Plan (the "ESOP"), Bruister & Associates Eligible Individual  
26 Account Plan (the "EIAP")(collectively, the "Plans"), and  
27 numerous other ERISA-governed plans. As service providers,  
28

1 Respondents provided valuations of closely-held companies to  
2 determine a value of the company's stock that was to be sold to  
3 an ERISA-governed plan such as an Employee Stock Ownership Plan  
4 ("ESOP"). JDN Aff. ¶¶ 3, 6 and 7.

5 5. Venue lies in the Northern District of California  
6 pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), as  
7 Respondents have and continue to conduct business in this  
8 judicial district.

9 6. The documents sought by the Administrative Subpoena  
10 *Duces Tecum* are believed to be located at Donnelly's residence  
11 at 180 2<sup>nd</sup> Street, Suite 419, Oakland, California 94607. JDN  
12 Aff. ¶ 8. As the Administrative Subpoena *Duces Tecum* seeks  
13 documents that were created as a result of work performed in  
14 Oakland, California, and the documents responsive to the  
15 Subpoena are located in Oakland, California, this case should be  
16 assigned to the Oakland District pursuant to L.R. 3-2(c).

17 **THE INVESTIGATION AND SUBPOENA**

18 7. At all times relevant hereto, the Secretary, through  
19 the Atlanta Regional Office of EBSA, has been conducting an  
20 investigation of the Plans, including service providers and  
21 others related to the Plans, under ERISA § 504(a), 29 U.S.C. §  
22 1134(a), to determine whether any person has violated or is  
23 about to violate any provision of Title I of ERISA or any  
24 regulation or order promulgated thereunder. JDN Aff. at ¶ 2.

25 8. In the course of its investigation, EBSA determined  
26 that obtaining certain information from Respondents was  
27 essential to determine whether any ERISA violations occurred in  
28

1 connection with the services provided by Respondents. Id. at ¶¶  
2 3-7.

3 9. On March 13, 2008, R.C. Marshall, Atlanta Regional  
4 Director of EBSA, pursuant to authority vested by ERISA §  
5 504(c), 29 U.S.C. § 1134(c), issued the Administrative Subpoena  
6 *Duces Tecum* ("Subpoena") directed to Respondents. Id. at ¶ 9.  
7 A true and correct copy of the Subpoena is attached as Exhibit A  
8 to the Del Nero Affidavit.

9 10. EBSA served the Subpoena on Respondent by U.S.  
10 Certified Mail, return receipt requested, on March 20, 2008. Id.

11 11. The Subpoena required Respondent to produce the  
12 responsive documents by March 28, 2008. JDN Aff., Exh. A.

13 **RESPONDENTS' FAILURE TO COMPLY WITH THE SUBPOENA**

14 12. On March 24, 2008, Respondents' attorney, Larry  
15 Israel, sent a fax acknowledging his clients' receipt of the  
16 Subpoena, and answered the Subpoena by asserting various  
17 objections and stating that Respondents had no responsive  
18 documents other than those that had already been produced or to  
19 which the objections applied. JDN Aff. at ¶ 10. A true and  
20 accurate copy of the fax is attached as Exhibit B to the Del  
21 Nero Affidavit.

22 13. Respondents claimed they have no documents responsive  
23 to paragraph 1 of the Subpoena asking for documents showing fees  
24 charged or received by Respondents. JDN Aff., Exh. A at ¶ 1 and  
25 Exh. B. However, Respondents have, at a minimum, a bank account  
26 with bank statements showing deposits, tax returns, 1099s and  
27  
28

1 electronic data stored in a Quickbook system, all of which would  
2 be responsive to the Subpoena. JDN Aff. at ¶ 8.

3 14. Under a prior subpoena, Respondents produced most  
4 documents responsive to paragraph 2 of the Subpoena, but have  
5 acknowledged that they have not done a thorough search and that  
6 additional documents likely exist. JDN Aff., Exh. B.

7 15. Respondents asserted baseless objections to paragraphs  
8 3-4 and 8-9 of the Subpoena. Respondents have not objected to  
9 paragraphs 5-7 of the Subpoena. JDN Aff., Exh. B.

10 16. To date, Respondents have provided no documents  
11 responsive to paragraphs 1 or 3-9 of the Subpoena. JDN Aff. at ¶  
12 11.

13 17. Undersigned counsel has had two telephone  
14 conversations with Respondents' counsel in a good faith effort  
15 to obtain Respondents' cooperation in providing the subpoenaed  
16 documents including an offer to review the documents as kept in  
17 the ordinary course of business to minimize Respondents' effort  
18 in complying. But, Respondents' counsel has continued to assert  
19 Respondents' unwillingness to comply with the Subpoena. Thus,  
20 the undersigned indicated to Respondents' counsel that the  
21 Secretary intended to proceed with enforcement of the Subpoena.

22 18. Despite counsel's efforts to obtain Respondents' full  
23 compliance with the Subpoena, Respondents have failed to produce  
24 any documents responsive to paragraphs 1 and 3-9 of the  
25 Subpoena.

**PRAYER FOR RELIEF**

WHEREFORE, the Petitioner prays that this Court enter an Order requiring Respondents to appear on a date certain to show cause, if any there be, why it should not appear before the designated EBSA representative at such time and place as the Secretary or the Court may set, then and there to produce such designated documents and records as required by the Subpoena; and that the Petitioner have such other and further relief as may be necessary and appropriate.

Dated: August 28, 2008

GREGORY F. JACOB  
Solicitor of Labor

STANLEY E. KEEN  
Regional Solicitor

ROBERT M. LEWIS, JR.  
Counsel for ERISA

By: \_\_\_\_\_  
DANE L. STEFFENSON  
Trial Attorney

SOL Case No. 08-60050

Attorneys for Petitioner  
U.S. Department of Labor

**CERTIFICATE OF SERVICE**

I am a citizen of the United States of America and am over eighteen years of age. My business address is 61 Forsyth St. Room 7T10, Atlanta, GA 30303. On April 28, 2008, I served the SECRETARY'S PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA DUCES TECUM, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA *DUCE TECUM*, AFFIDAVIT IN SUPPORT OF PETITION TO COMPEL RESPONDENTS TO PRODUCE DOCUMENTARY EVIDENCE, PROPOSED ORDER TO SHOW CAUSE, and MOTION FOR EXPEDITED HEARING on Respondents and Respondents' counsel, who stated he was authorized to accept service, by mailing in a sealed government envelope with postage thereon via United States mail addressed to:

Law Office of Larry Israel & Assoc.  
Attn: Larry Israel  
4454 Deer Ridge Road  
Blackhawk, CA 94506

Matthew J. Donnelly  
180 2<sup>nd</sup> St., Apt. 419  
Oakland, CA 94607

The Business Appraisal Institute  
Attn: Matthew J. Donnelly  
41 Sutter Street, Suite 1675  
San Francisco, CA 94104

There is mail service between the place of mailing and the place so addressed.

Executed: August 28, 2008

By: \_\_\_\_\_  
DANE L. STEFFENSON  
Trial Attorney